

Outline for Seminar (3 hours)

1. Introduce (talk about Hess case and others)

- A. Put up Hess Headline re: \$3.1 Million Verdict
- B. Talk about Hess case, multimedia on that case, show what contractor and developer did wrong.

2. I want to save you from being on the wrong end of one of these cases. And it can be done, if you will just follow the things you will hear.

3. Present some fact scenarios for discussion (they are in the notebook). Have participants write down answers (2 questions, one directed to disclosures and fraud, the other to construction defects).

Go over answers/discuss.

4. The Major Cases (Smith/Yadz) (note that Steve Q is the winning attorney in these, having argued them successfully before the Utah Supreme Court)

Go over each case with them (they are in the binders), tell story of facts, show rulings and what they mean.

This sections uses two movie clips.

Conclusions (bullet points)

5. The economic loss rule (brief explanation of what it is, American Towers, reaffirmed in Davencourt, etc.)

Davencourt and its import

- 1. Reaffirmed the general application of the economic loss rule
- 2. Change in the law: a developer owes a “limited fiduciary duty” to an HOA while in control of the HOA as a narrow exception to the economic loss rule
- 3. No independent duty to conform to the building code
- 4. No independent duty to act without negligence in construction of a home
- 5. Change in the law: Utah now has an implied warranty of workmanlike manner and habitability. Arises under contract law, and the duty is not abolished by the merger doctrine; it is independent and collateral to the covenant to convey the property. Does not require perfection in construction; there are minor procedural violations and defects in every home, and the implied warranty is not indefinite. Six year statute of repose. Applies only to the purchase of a new residence from a builder-vendor/developer-vendor.
- 6. Contract and warranty claims are collateral to conveyance of title

Codification of the economic loss rule, UCA 78B-4-513, why you need to be active in paying attention to legislation and the legislature. (Every year changes that impact contractors, such as lien laws, insurance rules, etc.)

Conclusions (bullet points)

6. Fraud

3 kinds of Fraud:

- a. Fraudulent Misrepresentation
- b. Fraudulent Nondisclosure
- c. Fraudulent Concealment

Discussion of how these come up in real life with contractors and developers

Go over Sellers Property Disclosures

How do NOT commit fraud

- a. Disclose
- b. Document in writing

7. Breach of Contract

- a. Talk about REPC
- b. Go over some good and bad contractor contract forms, talk about them
- c. Talk about material breach, relation with fraud, etc.

8. Warranties for sellers of property

Use REPC

9. Warranties for contractors (lots of focus and advice here)

- a. don't take on more than you should/get subcontractor warranties
- b. be specific
- c. third party warranties- have people get them
- d. sign off before move in for observable defects (examples)

Conclusion: A great contractor contract has these elements

10. An Ounce of Prevention is better than the pound of cure

- a. litigation costs and risks
- b. cost to do contracts right and organize right.

NO BRAINER

11. Construction Insurance (never covers fraud, doesn't cover negligent construction)
 - a. go over typical policies, show their limitation
 - b. what is available out there
12. Things change- keeping up on the law and statutory changes
13. Conclusion- How do you avoid a Hess result?
 - a. be honest, must disclose
 - b. do good work, honor your contractual obligations
 - c. protect assets, organize, follow rules (just in case)
 - d. Document, document, document. Keep good records.
 - e. Make sure basic contract docs are good and fair and protective
 - f. Insure